Filed 2/2/05 P. v. Medford CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. VICTOR MEDFORD, Defendant and Appellant.	B174149 (Los Angeles County Super. Ct. No. BA254769)

APPEAL from a judgment of the Superior Court of Los Angeles, County, Michael E. Pastor, Judge. Affirmed.

Rodney Richard Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, and Rama R. Maline, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Victor Medford (appellant) of three counts of petty theft with a prior theft conviction (Pen. Code,[1] § 666), two counts of second degree robbery (§ 211), exhibiting a firearm (§ 417, subd. (a)(2)), and assault with a firearm (§ 245, subd. (a)(2)). The jury found that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a)(1) in the commission of the assault. Appellant admitted suffering two prior convictions within the meaning of section 667.5, subdivision (b). Appellant was sentenced to 12 years and eight months in state prison with 184 days of pre-sentence custody credit.

On appeal, appellant argues that his due process right to a fair trial was violated when the trial court refused his request for an instruction in the language of Evidence Code section 412 that "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Appellant also argues that the prosecutor engaged in misconduct and that the trial court erred in failing to rule on his objection to the alleged misconduct.

We hold that the trial court properly refused appellant's requested instruction and, even if the instruction should have been given, any error was harmless. We also hold that the trial court did not abuse its discretion in ruling that appellant did not timely object to the alleged prosecutorial misconduct, and if there were any misconduct, it was harmless. Accordingly, we affirm the judgment.

---

[1] All statutory citations are to the Penal Code unless otherwise noted.

BACKGROUND

Shortly after 10 a.m. on June 7, 2003, Ralph's supermarket employee Timothy Connolly observed appellant on a monitor placing liquor bottles into a black duffel bag. Connolly went to the liquor aisle and saw appellant pushing a shopping cart with the black duffel bag inside toward the back of the store. Connolly asked appellant where he was going with the duffel bag. Appellant responded, "Why are you stopping me for?" Connolly put his hand on the bag and felt bottles inside. Connolly opened the bag and found six bottles of liquor. Connolly asked appellant to come with him to the office and appellant complied. Nestor Ramirez, a Ralph's employee, accompanied them.

At the office, Connolly took a Polaroid picture of appellant as a deterrent to future thefts. As Connolly interviewed appellant, appellant stood up, appeared agitated, and produced a small handgun. Appellant pointed the gun at Connolly's face and said something to the effect of, "Fuck you, motherfucker." Connolly, who had been standing in the doorway blocking appellant's exit, stepped back and appellant ran from the office and out of the store. Connolly contacted the police, and they took a report.

At about 9:30 p.m. on September 14, 2003, appellant and another person entered Rite-Aid at 5575 Wilshire Boulevard. Assistant manager James Black was familiar with appellant, having seen him shoplifting from the store on a number of prior occasions. Appellant, who was carrying a red and white tote bag, went to the liquor aisle. Black knew something was going on, so he went to the liquor aisle where he surprised appellant as appellant was filling the tote bag with bottles of liquor. Black asked appellant to leave the liquor and leave the store. Appellant attacked Black, striking him in the neck.

Appellant ordered Black to go to the stock room. Black started for the storage room, but went to a telephone instead and called the police. Appellant left with the store with the tote bag of liquor bottles without paying for them and without permission to take them. Black later identified appellant from a photographic lineup.

At about 2:30 p.m. on October 3, 2003, a Ralph's employee informed Connolly that someone was placing vitamins into a Ralph's gift bag. Connolly went on the sales floor and saw appellant approaching the front of the store holding a gift bag. Connolly asked appellant to give him the bag and took the bag from appellant. Appellant said something to the effect of, "Why don't you back up off me." Connolly said, "I need my merchandise back, and I need you to leave."

Appellant said something to the effect of, "You don't remember me, do you?" Connolly said he did not remember appellant. Appellant said, "Remember this?" Appellant simulated a gun with his hand and pointed it at Connolly's head. Connolly then remembered appellant as the person who had pulled a gun on him. Fearing that appellant might be armed, Connolly allowed him to leave the store.

As appellant walked through a check stand on his way out of the store, he took a display of disposable cameras. Ralph's employee Kenneth Cox, who was at the register in the next aisle, witnessed appellant's theft of the cameras. Another Ralph's employee, Robert Dotson, heard appellant say, "You remember what happened last time" and saw appellant take the cameras.

At about 10 a.m. on October 11, 2003, appellant entered the Orchard Supply Hardware (OSH) in the Midtown Shopping Center. Dotson, who worked at OSH as well as at Ralph's, notified his manager, Robert Hollingshed, that a person suspected of an armed robbery at Ralph's several weeks earlier was in the store. Dotson pointed out appellant to Hollingshed. Hollingshed called 911.

Hollingshed watched appellant as he was at the service desk near the register area. Appellant and had a blue tote in his shopping cart and a plastic bag on the cart's lowest tray. Hollingshed did not see appellant remove items from the bag and pay for them at the register. Hollingshed moved to the store's exit and was on the phone with the police when appellant left the store, setting off the store's Sensormatic alarm (tags on products not deactivated by cashiers set off an alarm when removed from the store).

Hollingshed asked appellant to step back in the store. He explained that appellant had something that set off the Sensormatic system and asked to see what was in the bag. Appellant did not cooperate. By this time, two police cars had arrived. When appellant apparently saw police officers getting out of their cars, he left the shopping cart and went back in the store.

Los Angeles Police Department Officer Richard Acevedo and other officers entered the store. Store employees pointed out appellant. The officers detained appellant and searched shopping cart and the bags inside the cart. The officers removed items from the bags such as a sander and a drill that had been in the tool corral inside OSH. Appellant did not have permission to take the items from the store. Officer Acevedo arrested appellant.

DISCUSSION

I. Appellant's Requested Evidence Code Section 412 Instruction

Evidence Code section 412 provides "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Section 412 applies only if it can be shown that a party actually possesses or has access to better and stronger evidence than it presented. (*People v. Taylor* (1977) 67 Cal.App.3d 403, 412.)

We review de novo a trial court's denial of a defendant's requested instruction. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089 overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) We review the erroneous denial of a defendant's requested instruction for prejudice under the *People v. Watson* (1956) 46 Cal.2d 818, 836 standard. (*People v. Wharton* (1991) 53 Cal.3d 522, 571; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 277-278.)

In this case, defense counsel requested an instruction in the exact language of Evidence Code section 412. Defense counsel argued that video recordings taken at

Ralph's and Rite-Aid were "stronger evidence" than the eyewitness testimony offered. The trial court initially denied appellant's request. After additional argument and its own research, the trial court determined that it was required to give the instruction on appellant's request. After still further argument, the trial court determined that its initial ruling was correct, and denied appellant's requested instruction.

Appellant argues on appeal that the trial court erred in refusing his requested instruction because a Polaroid photo and videotapes not produced at trial were stronger evidence than the eyewitness testimony presented. We hold that the trial court properly denied appellant's requested instruction.

A. *The Polaroid Photo*

Connolly testified that he took a Polaroid photo of appellant in an office at Ralph's after he caught appellant with liquor bottles in his duffel bag. According to Connolly, appellant pulled a gun and pointed it at him after he took the photo. There was no evidence presented in the trial court or any assertion made by defense counsel that a Polaroid had been taken of appellant while he was holding the gun. Connolly identified the photo, which was introduced into evidence. During opening and closing arguments, defense counsel admitted that appellant was depicted in the photo. Accordingly, as the evidence appellant claims was stronger was actually admitted into evidence, he has no claim that the trial court erred in denying his requested instruction as to the Polaroid.

B. *The Security Video Recordings*

Appellant failed to demonstrate that the alleged photographic evidence in this case was stronger than the eyewitness testimony presented because he failed to demonstrate what the photographic evidence purported to show. The evidence presented at trial showed that Ralph's had security cameras directed at various locations in the store, but not in the office where Connolly took appellant's photograph on June 7. Although Connolly testified that he reviewed the digital videos for June 7 and October 3, he did not

testify about what the videos depicted. Connolly did not testify that the videos for either date depicted the perpetrator committing any of the offenses or contained even an identifiable image of the perpetrator at all. Connolly did, however, testify that he thought a hallway camera recorded the top of appellant's head as he fled from the office where Connolly had taken his photograph.

The record also fails to disclose what the September 14 Rite-Aid videotape showed. Black testified that only one security camera, which was directed at the store's entrance, was working on September 14. Black did not testify that he had viewed the tape, and he did not testify about what the tape showed. That tape was turned over to the police who apparently lost it.

The eyewitness testimony in this case was strong. The eyewitness testimony about the events on June 7 consisted of Connolly's testimony identifying appellant as the person who pointed a gun at his head and Ramirez's corroborating testimony. Connolly had viewed, and interacted with, appellant at length. Connolly first viewed him on a monitor, then at the liquor aisle where Connolly spoke with him. Next, appellant accompanied Connolly to the office where Connolly again spoke to him and took his photograph. Finally, appellant pointed a gun at Connolly's face from about a yard's distance.

Ramirez also viewed appellant at length. Ramirez accompanied Connolly and appellant to the office. Ramirez was present when Connolly spoke with appellant in the office and took his photograph. Ramirez identified appellant as the person who pointed the gun at Connolly's head.

Black provided the eyewitness testimony for the events on September 14. As with the eyewitnesses on June 7, Black's contact with appellant was lengthy. Black testified that appellant entered the store carrying a red and white tote bag and went to the liquor aisle. Black knew something was up, so he surprised appellant as appellant was filling up the bag with bottles of liquor. Black then spoke with appellant, asking him to leave the liquor and leave the store. Appellant attacked Black, striking him in the neck. Appellant

then ordered Black to go to the stock room. Black was familiar with appellant, having seen him shoplifting in the store on a number of prior occasions. Black later identified appellant from a photographic lineup.

The eyewitness testimony about the events on October 3 consisted of Connolly's testimony that he attempted to stop appellant from stealing from the store and Cox's and Dotson's corroborating testimony. Connolly testified that he approached appellant and spoke with him. Connolly did not recognize appellant at first and appellant jogged Connolly's memory, saying, "You don't remember me, do you?" and simulating pointing a gun at Connolly and saying, "Remember this?" With appellant's assistance, Connolly remembered appellant from the previous incident where appellant had pulled a gun on him. Cox identified appellant as the person who stole a display of disposable cameras as he exited the store on October 3. Dotson testified that he heard appellant say, "You remember what happened last time" and he saw appellant take the cameras.

Because there is virtually no record of what the video recordings depicted, it would be wholly speculative to hold that the recordings were "stronger" evidence than the eyewitness testimony presented. Accordingly, the trial court did not err in refusing appellant's requested instruction.

C. *Prejudice*

Even if there were an error in not giving the instruction on Evidence Code section 412, such an error was harmless. The trial court instructed the jury on how to evaluate eyewitness testimony and witness credibility. (CALJIC No. 2.92; CALJIC No. 2.20.) The evidence of appellant's guilt was substantial. The testimony of a single witness is sufficient to support a judgment, unless the testimony is physically impossible or patently false. (Evid. Code § 411; *People v. Cudjo* (1993) 6 Cal.4th 585, 608.) As for the events on June 7 at Ralph's, the prosecution presented two eyewitness identifications and a corroborating Polaroid photo which defense counsel conceded depicted appellant. As for the October 3 events at Ralph's, the prosecution presented three eyewitness

identifications. As for the events on September 14 at Rite-Aid, the prosecution presented an eyewitness identification from a witness who was readily familiar with appellant -- having seen him on numerous prior occasions -- and who interacted with appellant at length at Rite-Aid. Finally, the requested instruction would not have applied to appellant's offense at OSH as there was no claim that OSH had security cameras and, in any event, defense counsel conceded appellant's guilt of that offense in closing argument. Given the eyewitness testimony, we cannot say that but for the trial court's failure to instruct the jury in the language of Evidence Code section 412, it is reasonably probable that appellant would have received a more favorable outcome. (*People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Wharton, supra,* 53 Cal.3d at p. 571; *People v. Dieguez, supra,* 89 Cal.App.4th at pp. 277-278.)

II. Prosecutorial Misconduct

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970.) A prosecutor is allowed in rebuttal argument to respond fairly to defense counsel's arguments. (*People v. Bryden* (1998) 63 Cal.App.4th 159, 184.) An appellate court reviews a trial court's ruling on prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

"To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 447; *People v. Frye, supra,* 18 Cal.4th at pp. 969-970.) Prosecutorial misconduct is reviewed for prejudice

under the *Watson, supra,* 46 Cal.2d at p. 836 standard. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

Defense counsel in his closing argument argued that there were security cameras in Ralph's and Rite-Aid and questioned why the prosecution failed to present the videos at trial. Anticipating the prosecutor's argument in rebuttal, as least with respect to the Rite-Aid videotape, defense counsel argued, "Now, the district attorney can stand up and say, 'Well, Mr. Williams could have tried to find the video or subpoenaed it from the police, or sought a duplicate from the video machine.' . . . [¶] Let's go back to who gets to go last. Who has to go last, and why that is. We don't have to prove anything. A defendant is presumed innocent. If there is proof that Mr. Medford was in the store on September 14 in the Rite-Aid, then you have to ask yourself why there is no video."

In rebuttal, the prosecutor argued, in relevant part, "Now, this issue about the videotapes, well, first of all, defense counsel can get any videos, any evidence that we have. He can bring it forth and present it to you."

Defense counsel did not immediately object to the prosecutor's remarks as misconduct and request the trial court to admonish the jury. Instead, defense counsel waited until a recess a short time later -- but after the prosecutor completed his rebuttal argument -- to state his objection. During the recess, defense counsel explained that he found the prosecutor's remarks objectionable because "he told the jury that had I wanted to present the video, that I could have presented the video. In point of fact, that is flat out not correct. [¶] Actually, we subpoenaed the video and were informed that LAPD had lost it. I don't think that it is right that the jury is now going in there to deliberate, to think about my whole argument about a video, that somehow I have probably seen it and it wasn't favorable to me, when the truth of the matter is that we made every effort to get the video and we were told that it was apparently misplaced."

The trial court told defense counsel that the "difficulty" with his objection was that it was not timely. Defense counsel acknowledged that he had considered objecting at the time the prosecutor made the remarks, but decided not to because he "thought it was

more tactful to be honest than to stand up and start making a speaking objection about how, look, we have tried to get those documents, tried to get the video. The video has apparently been lost. [¶] During the closing argument, I waited for what I thought was the most opportune time to raise it." The trial court in effect denied the objection as untimely.

On appeal, appellant argues that the prosecutor's remarks were misconduct and the trial court failed to rule on defense counsel's objection. Appellant is wrong on both points.

Contrary to appellant's argument, the trial court did rule on defense counsel's objection -- it ruled that the objection was untimely. Appellant acknowledged that he considered objecting at the time of the prosecutor's alleged misconduct but decided to wait for a more opportune time. The trial court did not abuse its discretion in finding the objection untimely. (*People v. Alvarez, supra,* 14 Cal.4th at p. 213.)[2]

The prosecutor's remarks were the very response defense counsel told the jury the prosecutor was likely to make to his argument about the prosecutor's failure to present the video recordings. Thus, there is no reasonable likelihood that the jury understood the prosecutor's remarks in an improper or erroneous manner. It is unlikely that the jury understood the remarks as implying that defense counsel had seen the video recordings and failed to present them at trial because they were not favorable to appellant's case. (*People v. Frye, supra,* 18 Cal.4th at p. 970.)

Thus, even if the prosecutor's remarks constituted misconduct, they were harmless. Moreover, as discussed above, the evidence of appellant's guilt was

---

[2] Appellant's failure to request an appropriate admonition from the trial court arguably forfeited this issue on appeal. Unless the misconduct could not have been cured by admonition, which appellant does not claim is the case here, prosecutorial misconduct is forfeited by the failure to request an admonition. (*People v. Frye, supra*, 18 Cal.4th at pp. 969-970; *People v. Price, supra,* 1 Cal.4th at p. 447.)

substantial. (*People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Barnett, supra,* 17 Cal.4th at p. 1133.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P.J.

KRIEGLER[*], J.

[*] Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.